

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

GU MARKETS, LLC. :
 :
 v. :
 :
 PNC FINANCIAL SERVICES GROUP, : CIVIL NO. 1:02CV99
 PNC BANK CORPORATION, :
 PNC MERCHANT SERVICES :
 MANAGEMENT, and PNC :
 MERCHANT SERVICES COMPANY :
 _____ :

RULING ON PLAINTIFF'S OBJECTION TO MAGISTRATE
JUDGE'S OPINION AND ORDER
(Paper 46)

After a hearing on March 7, 2003, Magistrate Judge Niedermeier issued an Opinion and Order (Paper 44) in which he recommended this Court grant defendant PNC Merchant Services Company's Motion for a Writ of Replevin (Paper 26). Plaintiff GU Markets has filed objections to the Opinion and Order.

When a Magistrate Judge assigned without consent of the parties rules on a pretrial matter which is dispositive of a claim or defense, that determination is subject to de novo review. See Fed. R. Civ. P. 72(b). Here, PNC Merchant Services Company (hereinafter "PNC") moved for a writ of replevin. The Magistrate Judge granted the motion and ordered plaintiff to return 15 pieces of equipment. Such a ruling is necessarily dispositive as to the issue of ownership of those assets and therefore is subject to de novo review. Cf. United States v. Davis, 794 F. Supp. 67, 68 (D.R.I. 1992) ("An order

striking affirmative defenses is dispositive of those defenses.”).

“In this context, ‘de novo determination’ means that the district court must review the magistrate’s findings and determine whether reliance should be placed on those findings; the reviewing court is not required to rehear testimony adduced at the magistrate’s inquest.” Cappetta v. Lippman, 913 F. Supp. 302, 304 (S.D.N.Y. 1996) (citations and quotations omitted); accord Ehinger v. Miller, 942 F. Supp. 925, 928 (S.D.N.Y. 1996) (“a de novo hearing is not required”). After making a de novo examination of the portions of the recommendation to which a party has made a specific, written objection, the Court may “accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate.” Advance Coating Tech., Inc. v. LEP Chem. Ltd., 142 F.R.D. 91, 93 (S.D.N.Y. 1992) (quoting 28 U.S.C. § 636(b)).

By filing an application for a writ of replevin, PNC sought to take possession of credit and debit card processing equipment which it had rented to Grand Union prior to that company’s filing for Chapter 11 bankruptcy. GU Markets alleges it acquired ownership of PNC’s equipment when it purchased Grand Union assets during the bankruptcy proceedings.

In 5 King, Collier on Bankruptcy § 541.06[1] (15th ed. 2003), the author explains a fundamental and relevant bankruptcy principle:

Items in the possession of the debtor may become property of the estate only to the extent of the debtor's property interest in those items. It is necessary to examine whether the debtor owns the property absolutely, conditionally, or merely through some lesser relationship, such as a bailment, agency, or consignment, whereby the goods actually belong, save for the debtor's right to possession, completely to another. This a critical component of determining what interests in the property will comprise property of the estate. It may also be important from the standpoint of the trustee's avoidance powers under sections 544, 547, and 548. One court has held that a mere expectation of renewal of an interest in property is not a property right. The Court ruled that a debtor's opportunity to renew season tickets to professional basketball games, revocable by the professional athletic club, was not a property right includible in debtor's estate. (footnotes omitted).

By comparison, this record reveals no serious dispute as to PNC's contention that it is the owner of the equipment, and that Grand Union was a lessee. Instead, GU Markets continues to argue "the property has been abandoned and has become the property of Grand Union or the entities who acquired its assets under the [reorganization] plan." Paper 46 at 5. This argument, however, is belied by the fact that this suit involves, inter alia, the defendant's alleged wrongful

collection of "rental" fees on that equipment, an action clearly inconsistent with abandonment. See Paper 46 at 1.

Furthermore, the confirmation order upon which the plaintiff relies, on its face, does not vest title of property rented by Grand Union in the purchaser of its assets. See Paper 46, Exhibit B. As 11 U.S.C. § 541 makes clear, Grand Union's bankruptcy estate could only contain the same property interest as was held by the debtor, not a greater interest. Since GU Markets obviously does not want to rent the processing equipment, it is difficult to ascertain why it should not be required to return the 15 items to their owner. See V.R.C.P. 64(a) (replevin is available for goods wrongfully "detained").

The plaintiff also objects to the bond established by the Magistrate Judge. See Paper 46 at 5. In relevant part, V.R.C.P. 64(b)(2) requires a court to establish a bond "based upon a reasonable valuation for the property of which replevin is sought" Magistrate Judge Niedermeier found that amount to be \$1000 per piece of equipment, or \$15,000 total. See Paper 44 at 15. As noted by PNC, the plaintiff, at various times during this litigation, has intimated this equipment is of minimal value. See Paper 47 at 9 (citing GU Market's declarations in prior pleadings). Given this representation, as well as the plaintiff's failure to provide

this Court with any other evidence of value, the Court agrees that the bond set by the Magistrate Judge is adequate and reasonable.

Lastly, the plaintiff objects to the portion of the Opinion and Order in which Magistrate Judge Neidermeier grants PNC's request to inspect other equipment in its possession. PNC made this discovery request during the hearing on the Motion for a Writ of Replevin. See Paper 46 at 10.

"As to nondispositive pretrial matters, the district court reviews the magistrate's order under a 'clearly erroneous or contrary to law' standard of review." Comeau v. Rupp, 142 F.R.D. 683, 684 (D. Kan. 1992). Accordingly, a district court's review of pretrial discovery rulings is "typically deferential." Clark v. Milam, 155 F.R.D. 546, 547 (S.D. W.Va. 1994). "Under this standard, the court must affirm the decision of the magistrate unless on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." Comeau, 142 F.R.D. at 684 (citations and quotations omitted).

According to Magistrate Judge Neidermeier,

only 15 pieces of equipment now in GU Markets' possession match serial numbers provided by PNC Merchant Services. Those 15 pieces are governed by this order. In addition, PNC Merchant Services requested that it be able to inspect the other credit card processing equipment that GU Markets acquired through the bankruptcy sale. According to

GU Markets, all of the equipment is currently in one location, and allowing PNC Merchant Services access may narrow the scope of its counterclaim. Therefore, PNC Merchant Service[s'] request to inspect is also granted.

Paper 44 at 14 (footnote omitted).

The plaintiff explains: "While GU Markets does not object to permitting PNC access to this remaining equipment to verify that it does not bear the serial numbers PNC has claimed as identifying equipment that PNC claims was leased to Grand Union, GU Markets objects to any claim that PNC might assert with respect to that equipment." Paper 46 at 11. On its face, the Magistrate Judge's order does not purport to resolve any such claims; it simply permits inspection to determine whether more equipment is subject to dispute. Given the nature of the parties' claims and the liberal scope of discovery, the Court is unable to conclude the Magistrate Judge's order granting inspection is either clearly erroneous or contrary to law.

Upon de novo review, the Opinion and Order of the Magistrate Judge granting the Writ of Replevin is AFFIRMED, APPROVED and ADOPTED. Upon review under the "clearly erroneous" standard, the Opinion and Order of the Magistrate Judge granting PNC permission to inspect is likewise AFFIRMED, APPROVED and ADOPTED.

SO ORDERED.

Dated at Brattleboro, Vermont, this ____ day of June,
2003.

J. Garvan Murtha
United States District Judge